ARM-BOS.

Office - Supreme Court, U.S.
FILED
APR 28 1945
CHARLES ELMORE CROPLEY
CLERK

No. 1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ARMOUR AND COMPANY, an Illinois Corporation,
Petitioner,

vs.

CHESTER BOWLES, Price Administrator,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

DONALD R. RICHBERG,
CHARLES J. FAULKNER,
FREDERICK R. BAIRD,
GEORGE E. LEONARD, JR.,
Attorneys for Petitioner.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

150604

Index to Petition

	Page
Opinion Below	1
Statute Involved	2
Jurisdiction	2
Statement	2
The Questions Presented	9
Reasons for Granting the Writ	10

Index to Brief

Preliminary Statement	13
Specification of Errors	14
Argument	15
I. Revised Maximum Price Regulation 169 is invalid because it requires the sale of carcass beef and wholesale cuts at prices which do not return the cost of production	15
II. The cut-out Test Method of determining costs of producing beef is the long-established method and practice which the Administrator had no authority to disregard	21
III. Even allocating the profits of by-product operations as a credit against the cost of producing beef, the maximum prices for beef did not return cost of production	26

Table of Authorities

Petition

Gillespie-Rogers-Pyatt Co., Inc., et al v. *Bowles*, 144 F. (2d) 361 (1944)	7
Heinz et al v. *Bowles* (Decided March 29, 1945 by United States Emergency Court of Appeals)	8
Constitution—Article I, Sixteenth Amendment, Fifth Amendment	10, 11
Emergency Price Control Act of 1942 as amended (50 App. U. S. C. 902, 923, 924, 963)	2, 11, 12
Sec. 2(a)	6, 9, 10
Sec. 2(h)	5, 10

Page

Judicial Code, Sec. 240(a) (28 U. S. C. Sec. 347)..... 2
Stabilization Act of 1942 (amending Emergency Price Control Act of 1942) (56 Stat. 765; 50 App. U. S. C. 963)..... 9
Stabilization Extension Act of 1944 (amending Emergency Price Control Act of 1942) (58 Stat. 632; 50 App. U. S. C. 902)..... 6, 10

Brief

Heinz et al v. *Bowles* (Decided March 29, 1945 by United States Emergency Court of Appeals)..... 17
Constitution—Fifth Amendment..... 14
Emergency Price Control Act of 1942 as amended (50 App. U. S. C. 902, 923, 924, 963)..... 13, 24
Sec. 2(a)..... 14, 15, 21
Sec. 2(h)..... 21
Stabilization Act of 1942 (amending Emergency Price Control Act of 1942) (56 Stat. 765; 50 App. U. S. C. (963)
Sec. 3..... 14, 23
Stabilization Extension Act of 1944 (amending Emergency Price Control Act of 1942) (58 Stat. 632; 50 App. U. S. C. 902)..... 21

Appendix

Emergency Price Control Act of 1942 as amended (50 App. U. S. C. 902, 923, 924, 963)
Sec. 2(a)..... 31
Sec. 2(h)..... 32
Sec. 203(a)..... 33
(b)..... 33
(c)..... 34
Sec. 204(a)..... 34
(b)..... 35
(c)..... 35
(d)..... 36
Stabilization Act of 1942 (amending Emergency Price Control Act of 1942) (56 Stat. 765; 50 App. U. S. C. 963)
Sec. 3..... 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ARMOUR AND COMPANY, an Illinois Corporation,
Petitioner,

vs.

CHESTER BOWLES, Price Administrator,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Armour and Company, an Illinois corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above-entitled cause on March 29, 1945.

Opinion Below

The opinion of the Emergency Court, not yet reported, appears in the printed record, pp. 441-459.

Statute Involved

The statute involved is the Emergency Price Control Act of 1942 as amended (50 App. U. S. C., Secs. 902, 923, 924, 963), the pertinent provisions of which are printed in the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942 (50 App. U. S. C., Sec. 924(d)) and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

Statement

This case arose out of the protest of Armour and Company filed February 8, 1943 against Revised Maximum Price Regulation 169, which fixed the ceiling prices of beef and veal carcasses and wholesale cuts, and was issued by the Administrator of the Office of Price Administration on December 10, 1942. After a denial of the protest on October 27, 1943, a complaint by Armour and Company to the United States Emergency Court of Appeals was filed November 26, 1943. The court on January 10, 1944 granted an application by complainant for leave to introduce additional evidence. The protest proceedings were reopened, additional evidence received, and on June 21, 1944 the Administrator issued an order denying the protest upon reconsideration. An amended complaint was filed in the Emergency Court by Armour and Company; and at the hearing both complainant and respondent were permitted to introduce certain additional evidence directly to the court.

On March 29, 1945, the Emergency Court handed down its opinion and entered a judgment dismissing the com-

plaint and sustaining the maximum price fixed for beef, on the following grounds:

1. That returns from "cattle operations as an entirety"[1] covered "out-of-pocket costs" of the products of all such operations ("out-of-pocket costs" being defined to *include* direct labor and material costs and to *exclude* administrative and selling expenses), and that therefore the maximum price for beef met the statutory standards of being "generally fair and equitable" and "allowning a generally fair and equitable margin for * * * processing."

2. That the long-established accounting method used by the industry for determining the cost of beef "is not an acceptable yardstick for determining whether the regulation establishes generally fair and equitable maximum prices."

3. That the fixing of different maximum prices for beef for processing slaughterers and non-processing slaughterers[2] (with similar costs of production), through the device of special subsidies to non-processing slaughterers, is not an unlawful discrimination which would invalidate the maximum price regulation.

There is substantially no dispute over facts in the present case. The issues arise over (1) interpretation of the statutory standards for price-fixing laid down in the Emergency Price Control Act of 1942 and subsequent amendments thereto; (2) the proper accounting methods to determine costs of production; (3) the legality of a maximum price

---

[1] These operations included, in addition to beef production, the production of all commodities resulting from processing the by-products of cattle slaughter, such as leather, soap, etc.

[2] Processing slaughterers are those who sell beef and process cattle by-products. Non-processing slaughterers are those who sell beef and sell raw cattle by-products.

which requires all producers of a commodity to sell that single commodity at a loss; (4) the legality of a maximum price which has to be supported by a subsidy to single-product producers (because they could not continue to produce at a loss), but which is not supported by an equal subsidy to multi-product producers (on the ground that their profits from the production of other commodities will permit them to continue production); and (5) the legality of using the composite returns from the sale of all products related to cattle slaughter to determine whether the prices established for beef are "generally fair and equitable" and allow "a generally fair and equitable margin for * * * processing."

The protest and complaint of Armour and Company against Rev. Max. Price Regulation 169 were based upon, and supported by, evidence that, using the established "cut-out" Test Method of cost accounting, the Administrator's own figures showed an average loss for the industry under Rev. Max. Price Regulation 169, December, 1942, through July, 1943, as follows:

Grade AA carcass beef loss	$1.835 per cwt.
Grade A carcass beef loss	$2.106 per cwt.

(R. 242-251)

Comparable losses for these and all other grades have continued to date.

Using the same cut-out Test Method, Armour and Company showed losses in its Beef Division for the fiscal years 1942, 1943, and the first ten months of 1944, as follows:

1942—Beef Division loss (Cut-Out Test)—$3,244,000
1943—Beef Division loss (Cut-Out Test)—$9,811,000
10 months
1944—Beef Division loss (Cut-Out Test)—$7,482,000

(R. 124)

The cut-out Test Method is admittedly the long-established method of computing beef costs. According to an authoritative writer quoted in the opinion of the court: (R. 451) "This is the accepted method of computing the cost of a dressed carcass; and it is the method that the packer must follow if he is to conduct his business intelligently."[3]

The Administrator refused to accept the cut-out Test Method of cost accounting despite specific requirements of the Emergency Price Control Act of 1942 as amended. The original Act provided, in Section 2(h), as follows:

> "The powers granted in this Section shall not be used or made to operate to compel changes in business practices, *cost practices or methods*, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." (Italics ours.)

---

[3] The following authoritative description of the cut-out Test Method is quoted in the court's opinion (R. 450):

> "To explain the packer's cost-finding methods more fully take the problem of the butcher who buys a steer weighing 1,000 pounds alive, for which he pays $100.00. When he has slaughtered and dressed it, he will have a dressed carcass of beef weighing about 500 pounds, a hide, some fats, a tongue, a heart, a liver, and many other by-products. How will he figure costs?
>
> "He knows that he can sell the hide for, say $20.00; the fats for $3.00; and the other by-products for $2.00—a total of $25.00 worth of by-products. He knows also that the slaughtering and dressing has cost him, say, $5.00. Naturally he will figure the dressed cost of the carcass of beef in this manner:
>
> | | |
> |---|---|
> | "Paid for live steer weighing 1,000 lbs. | $100.00 |
> | Expense of slaughter and dressing | 5.00 |
> | Total cost of dressed beef and by-products | $105.00 |
> | Can sell by-products to net | 25.00 |
> | Balance, cost of 500 lbs. of dressed beef | $80.00 |
>
> or an average of 16 cents per pound."

The Stabilization Extension Act of 1944 amended the foregoing provision by prohibiting changes in established practices, except where such action was affirmatively found by the Administrator to be necessary to prevent evasion, and then strengthened this provision most significantly by adding a proviso in Section 2(a) (which authorizes price-fixing), this proviso reading as follows:

> "Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods."

The Administrator contended, however, that the cut-out Test Method showed merely "bookkeeping losses," although it was admitted that credits for by-products were deducted from beef costs at the amount of the market value or ceiling price of the unprocessed by-products.

The Administrator refused to accept the "cut-out" Test Method of cost accounting primarily on the ground that it did not fully take into consideration results obtained from the processing of by-products. But the evidence presented by Armour and Company, in conformity with what was termed the "OPA Method" of cost accounting, showed that after the transfer of proportionate profits to the Beef Division from all operations utilizing by-products (pharmaceuticals, soap, leather, glue, sausage, canned meat, etc.), the Beef Division still suffered heavy losses by reason of inadequate ceiling prices for beef (R. 120).

Thus the Administrator was forced to return to an early position (rejected in an earlier hearing by the Emergency Court) that if the over-all profits of Armour and Company were equal to, or exceeded, average peacetime earnings (period, 1936-1939), Armour and Company could be required to sell beef below cost of production. He thus fell back, in the language of the court, "on the primary test of over-all profits, which indiscriminately includes not only

the profits of the industry attributed to cattle operations but also an important part of the industry's profits not in any way attributable to the domestic slaughter of cattle" (R. 456).

The court rejected this over-all profits test, pointing out that if accepted "there would be no legal limitation to the extent to which the Administrator could depress prices of a given commodity so long as the industry as a whole maintained its base period earnings" (R. 456).

The court rejected the cut-out Test Method of cost accounting advocated by Armour and Company, and also the over-all profits test advocated by the Administrator, and extended a dual test first announced in *Gillespie-Rogers-Pyatt Co., Inc., et al.* v. *Bowles,* 144 F. (2d) 361 (1944) (R. 454). In that case, the issue was as to whether maximum prices previously accepted had become unfair and inequitable; and the court laid down the standard of price-fixing for a multi-product industry as follows:

First, are the industry earnings under price regulation equal to normal peacetime earnings or better? If earnings are subnormal, price increases may be required. Second, if price increases are not required by subnormal earnings, an increase may be required for an individual product if the current maximum price fails to cover out-of-pocket costs (assuming that it has not been the industry's practice to sell such a product below cost).

But the court extended the doctrine of the Gillespie case and held that the single-product standard should be applied to "cattle operations as an entirety, treated either as a single product or as a closely related group of products." So the court rejected the cut-out Test Method of determining the cost of production of carcass beef as a single product and tested the fairness of the ceiling price for beef by the results of Beef Division operations as a whole, crediting against losses from the sale of beef all the profits of operations utilizing by-products of cattle slaughter. But

even these computations would have failed to sustain the fairness of ceiling prices for beef without the use by the court of an extraordinary standard not authorized in any way by the Emergency Price Control Act, that is, the standard of "out-of-pocket costs" (R. 454-458).

In a word, the court sustained a maximum price for beef which did not return costs of production according to any accepted method of accounting, and which of course provided no compensation for an enormous investment in the plant, although if a producer were occupying a *leased* building he would certainly find it necessary to pay his rent! But in order to sustain the court's conclusion, it was necessary for the court to eliminate a very large item of cost which has to be recouped in the selling price of a product. The court eliminated administrative and selling expenses and established a definition of "out-of-pocket costs" without warrant in the statute, in sound accounting, or in common sense. (R. 457.)

On the same day on which the Emergency Court dismissed the complaint of Armour and Company, it entered a judgment setting aside Rev. Max Price Regulation 169 in so far as the maximum prices therein for beef carcasses and wholesale cuts were made applicable to non-processing slaughters. (*Heinz, et al.* v. *Bowles*—Decided March 29, 1945.) In its opinion, the court found specifically that slaughterers who simply sold beef and by-products (without processing the by-products) could not realize enough on the sale of beef at the established maximum prices to cover their costs, *even though such non-processing slaughters have been given a special additional subsidy of 80¢ per cwt.* above what is allowed to the processing slaughterers such as Armour and Company. Nevertheless, the court held:

"The non-processing slaughterers as a group on the Administrator's own computation have been afforded no

margin for profitable operation. Indeed consistent losses are indicated."[4] Thus the court sustained as a lawful price regulation the fixing of different maximum prices for different producers of precisely the same commodity, not on the basis of a difference in costs of production but on the basis that one producer is making money out of the production of *other* products, so he can afford the loss, whereas the single-product producer must go bankrupt. Petitioner submits that this is (1) a discrimination not authorized in the federal statutes, and (2) a discrimination which could not be constitutionally authorized.

The Questions Presented

The following principal questions are presented:

1. On the admitted facts of record, does Rev. Max. Price Regulation 169 comply with the statutory requirements of a "generally fair and equitable" price (Section 2 (a), Emergency Price Control Act of 1942) and a "generally fair and equitable margin" for processing (Stabilization Act of 1942)?

2. If it be lawful to fix the maximum price for a single product of a multi-product industry at an amount that only covers "out-of-pocket costs," can "out-of-pocket costs" be legally defined to include only labor and material costs and to exclude general overhead, administrative, and selling expenses?

---

[4] The cost of production for non-processing slaughterers were determined by all parties by using the cut-out Test Method (rejected by the court and Administrator for Armour), and in the costs, administrative and selling expenses were included (which were rejected by the court and Administrator for Armour).

The Administrator stated: "The cut-out test, which is irrelevant for the industry generally, is an adequate basis for testing the position of the non-processing slaughterers, since their actual realization from cattle is derived solely from the sale of the carcass and unprocessed by-products" (R. 309).

3. Can different miximum prices be lawfully fixed for the same commodity so as to provide profitable prices for some producers while at the same time requiring other producers, with similar production costs, to sell the commodity at a loss?

4. Is Revised Maximum Price Regulation 169, as sustained by the court, an invalid regulation of the maximum prices for beef carcasses and wholesale cuts as being not in accordance with law, arbitrary and capricious, and a violation of the constitutional rights of petitioner under the Fifth Amendment?

The following subsidiary questions are presented:

1. Can a multi-product producer be required to change cost accounting practices and methods, in view of the requirements of Section 2(h) of the Emergency Price Control Act of 1942?

2. Can the Administrator fix prices on a basis that requires the determination of costs otherwise than in accordance with established accounting methods, in view of the amendment to Section 2(a) of the Emergency Price Control Act of 1942 by the Stabilization Extension Act of 1944?

Reasons for Granting the Writ

1. The decision of the United States Emergency Court of Appeals in this case involves a construction of the Emergency Price Control Act of 1942 and an interpretation of the statutory requirements for fixing maximum prices for commodities under the authority granted in that Act, which is a pioneer decision of far-reaching consequence to producers and consumers of vitally essential products. The principles laid down by the court will determine the bases for fixing prices not only of the meat supplies of the nation, but also the prices of numerous essential commodities which are produced by multi-product industries.

2. The decision permits the Price Administrator to set up his own cost accounting methods, regardless of established accounting methods, which procedure, in effect, requires the determination of costs by novel methods and compels changes in business practices and methods, in complete disregard of the specific provisions of the Emergency Price Control Act of 1942 as amended.

3. The decision of the court sustains a discrimination as to prices between producers of the same commodity by including subsidies as an economic factor in price regulation and approving differential subsidies based not on different costs of production, but based solely on the fact that some producers make additional profits out of the production of other commodities which are charged off against losses through the production of under-priced commodities.

We submit that there is no warrant in the law for requiring a person engaged in several businesses to subsidize the losses of one by the profits of others, while at the same time providing a public subsidy for a person engaged only in the one, losing business. As a method of taxing profits, such a procedure violates the constitutional limitations regarding taxation defined in Article I, Sec. 2 and Sec. 7, and the Sixteenth Amendment. As the appropriation of the earnings of a person to public uses or for the benefit of others by executive order, it violates the Fifth Amendment. As an arbitrary discrimination and a denial of equal protection of the laws, it violates also the Fifth Amendment.

4. The United States Emergency Court of Appeals has decided, we believe erroneously, questions of great public importance seriously affecting the welfare of the people of the United States, impeding the production of food essentialy normally to the well-being of the people, and peculiarly important in this time of war.

5. Under the Emergency Price Control Act, the power of judicial review of the administration of the Act is vested exclusively in the Emergency Court of Appeals, whose judgment is subject only to review through a petition for a writ of certiorari to the Supreme Court, thereby imposing a peculiar responsibility upon the Supreme Court to exercise its discretion to grant a review of such a case of first impression and far-reaching public importance as is here presented.

WHEREFORE, the petitioners pray that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in this case March 29, 1945.

Dated: April 28, 1945.

Respectfully submitted,

DONALD R. RICHBERG,
CHARLES J. FAULKNER,
FREDERICK R. BAIRD,
GEORGE E. LEONARD, JR.,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ARMOUR AND COMPANY, an Illinois Corporation,
Petitioner,

vs.

CHESTER BOWLES, Price Administrator,
Respondent

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

Preliminary Statement

We refer to the foregoing petition for a citation of the opinion below, statement of grounds of jurisdiction, citation of the statute involved, and a summary statement of the case.

It seems necessary to emphasize here only the fact that this case involves a pioneer construction of the Emergency Price Control Act of 1942; that the interpretation placed by the Price Administrator and by the court on the statutory requirements for fixing maximum prices has far-reaching consequences, not only to the producers of meat and the

processors of the many by-products of animal slaughter, but to the producers and consumers of a host of other essential commodities supplied by multi-product industries.

Specification of Errors

The following are urged as the errors of the United States Emergency Court of Appeals:

1. The court erred in not holding Revised Maximum Price Regulation 169 invalid as being arbitrary and capricious, not in accordance with law, and a violation of petitioner's rights under the Fifth Amendment of the Constitution;

2. The court erred in holding that the prices established by Revised Maximum Price Regulation 169 are "generally fair and equitable" as required by Section 2(a) of the Emergency Price Control Act of 1942, as amended;

3. The court erred in holding that the prices established by Revised Maximum Price Regulation 169 allow "a generally fair and equitable margin for * * * processing" as required by Section 3 of the Stabilization Act of 1942;

4. The court erred in holding that the so-called McKellar amendment in Section 3 of the Stabilization Act of 1942 (which provided "* * * that in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing * * *") "did not modify the basic statutory standard in Section 2(a) that maximum prices must be 'generally fair and equitable'; which would naturally mean that the prices established must allow a generally fair and equitable margin";

5. The court erred in rejecting the "cut-out" Test Method of beef cost accounting;

6. The court erred in holding that where "* * * industry earnings are above their normal peacetime

level, no adjustment of maximum prices is required if, at established ceilings, the cattle operations are producing enough to cover out-of-pocket costs in respect thereto";

7. The court erred in treating all products containing any material derived from the slaughter of cattle as a single product;

8. The court erred in defining "out-of-pocket costs" so as to exclude general overhead, such as administrative and selling expenses.

9. The court erred in sustaining a discrimination as to prices between producers of the same commodity by including subsidies as an economic factor in price regulation and approving differential subsidies, not based on different cost of production, but based solely on the fact that some producers make profits out of the production of other commodities which the Price Administrator charges off against losses through the production of under-priced commodities.

ARGUMENT

I

Revised Maximum Price Regulation 169 is invalid because it requires the sale of carcass beef and wholesale cuts at prices which do not return the cost of production.

The Emergency Price Control Act of 1942 (Sec. 2(a)) authorized the Price Administrator to establish maximum prices for commodities which would be "generally fair and equitable." Certain standards were provided to guide the administrative judgment, but the dominant rule was laid down in the broad phrase "generally fair and equitable."

As the court found, the Administrator acted upon the theory that "even without ceiling prices on live cattle, the influence of wholesale beef ceiling prices would result in maintaining the historical relationships between wholesale

beef and livestock prices." As the court further held, "Unfortunately, this theory did not seem to work out under the abnormal conditions of a wartime economy. Soon after RMPR 169 was issued, cattle prices began to rise; the cattle prices on which the regulation appears to have been predicated were soon left behind in the rising market" (R. 444).

The inevitable result of the failure of the Administrator's theory was that slaughterers of cattle were compelled to sell beef at prices which, because of the price of livestock, did not return to the slaughterers their costs of production. In the language of the Economic Adviser to the Administrator, quoted by the court, the processors "got a miserable shellacking for 9 months, an inexcusable shellacking" (R. 445).

In order to improve this situation, a program was adopted of paying subsidies to the slaughterers and (again quoting the court), "The Administrator relies heavily upon the operation of the subsidy program as sustaining the present validity of RMPR No. 169" (R. 447). Therefore, the subsidy payments must be regarded essentially as additions to the maximum prices. The question thus presented is whether the maximum price fixed for beef, plus the subsidy payment, covers the cost of production of such beef.

It is important here to note that non-processing slaughterers (those who slaughtered cattle and sold the beef and the raw by-products, but did not process the by-products) were granted a special additional subsidy of 80 cents per cwt. beyond the subsidy granted to processing slaughterers. Therefore the Administrator must concede that, since the actual costs of slaughtering beef and selling the by-products do not differ materially between processing and non-processing slaughterers, the former must lose 80 cents per cwt. more than the latter. Yet on the very day when the court held that beef prices were "generally fair and equitable" for the processing slaughterers, the same court held that the same

prices were inadequate and invalid for non-processing slaughterers.[5]

We will discuss later in this brief the legality of this discrimination between producers of the same commodity. We refer to it now in order to emphasize the point that on the record there is no question that maximum prices for beef are insufficient to reimburse the slaughterer of beef for the cost of cattle and the total cost of slaughtering and dressing, minus the revenue obtained by *selling* the by-products.

It was the Administrator's original and favorite contention that if all the profits derived from all of Armour's varied operations equalled or exceeded peacetime earnings, the maximum prices fixed for beef should be sustained regardless of any showing as to the costs of beef production. The court rejected this contention, in the following language:

> "He falls back, therefore, on the primary test of over-all profits, which indiscriminately includes not only the profits of the industry attributed to cattle operations but also an important part of the industry's profits not in any way attributable to the domestic slaughter of cattle. But if this over-all profits test were to be sustained, it would tend to produce the result mentioned in the italicized portion of the memorandum quoted in the *Gillespie* case and set forth above. It would be saying in substance that the Administrator has power to subsidize the consumer in his purchases of beef to the extent that the present over-all profits of the industry are above those of the base period. There would be no legal limitation to the extent to which the Administrator could depress prices of a given commodity so long as

---

[5] Shortly after this decision, the court entered an order, April 2, 1945, setting aside the judgment in favor of non-processing slaughterers, in conformity with an agreement between these slaughterers and the Price Administrator whereby the reduction of the 80-cent special subsidy to 30 cents, which had been ordered to take effect April 1st, would be abandoned and the full 80-cent special subsidy continued for the benefit of non-processing slaughterers. (*Heinz et al.* v. *Bowles, supra,* p. 8.)

the industry as a whole maintained its base period earnings."

In support of this rejection of the over-all profits test, we should point out the evidence, not contradicted, that certain Armour operations (oil products, oil mills, canned foods other than meat, poultry and dairy, sandpaper, ammonia, storage, trucking, Havana fertilizers, spice, chemicals, fertilizers, foreign operations, car lines, and miscellaneous) showed a combined profit in 1943, not attributable to any domestic slaughter, amounting to $19,901,000 (R. 118). Additional profits of processing departments, attributable solely to pork, sheep, and calf slaughter and not to cattle slaughter, amounted in 1943 to $15,029,000.

The total profits of these operations, amounting to $34,930,000, should be considered in connection with the reference in the opinion of the court to Armour's profits, *before taxes*, amounting to $36,000,000. This makes it clear that the Administrator was insisting, in effect, that Armour should be compelled to sell beef at a loss (although non-processing slaughterers could not be so compelled), not because Armour was making money indirectly out of cattle slaughter, but because Armour was making enough money out of other industrial operations so that it could meet beef losses and still continue in business. This meant that while the government found it necessary to "subsidize the consumer in his purchases of beef" from non-processing slaughterers, the government was seeking to compel Armour to subsidize the consumer in his purchases of beef produced by Armour.

The court has, however, modified the Administrator's insupportable theory of over-all profits and approved the theory that since a few large slaughterers, such as the present petitioner, process their by-products instead of selling them to separate processors, there should be deducted from

the cost of beef, not merely the market value of the raw by-products, but all the *profits* made by the subsequent processing of the by-products. Here is a simple example:

One by-product of cattle slaughter is hides. The great majority of slaughterers sell hides—for which there are ceiling prices fixed by OPA. The present petitioner and a very few other packers sell hides, in part to outsiders and in part to the Leather Division of the company's operations. This Leather Division also buys hides in the general market. So the Leather Division operates as a separate business, the cost of its raw materials being largely the price paid for hides, which is the ceiling price. The Leather Division sells its leather, for which there are also ceiling prices. The leather industry is a separate industry in which the petitioner is in competition with many large producers who are not slaughterers.

In a similar manner, the petitioner makes soap, buying its raw materials, oils, etc. (at ceiling prices) and selling its products (at ceiling prices) in competition with such large independent concerns as Procter & Gamble, Colgate-Peet-Palmolive, and Lever Brothers.

Only a limited number of slaughterers engage in these various industries, which process raw materials which are in part by-products of cattle slaughter. Thus maximum prices for beef are sustained for one "industry" on the basis of the profits of the operations of several *other* industries in which a *few* of the meat-packers engage. These few do represent a large volume of the slaughtering business, but they are only a small fraction of the numbers engaged. Hence a special subsidy has been found necessary to save a large number of enterprises from insupportable losses.

It is now the modified contention of the Administrator, sustained by the court, that all the profits of processing by-

products of cattle slaughter should be credited against the cost of beef, and thereby losses on beef should be eliminated which would be inevitable if only the revenue from the *sale* of raw by-products were credited against the cost of producing beef.

The petitioner contends that the cost of producing beef should be determined for Armour, as well as for non-processing slaughterers, by the established cut-out Test Method of accounting. Against this contention, the court has held that all profits from the processing of by-products of cattle slaughter (which can be attributed to the use of such by-products) should be credited to the Beef Division and, if then the Beef Division as a whole has recovered its "out-of-pocket costs," the maximum prices for a single commodity, such as beef, will be sustained.

The result of this holding is to approve maximum prices for a commodity which deny *some* producers the cost of production of that commodity, while at the same time *increased* maximum prices are authorized for *other* producers of the same commodity through the device of a subsidy. This inequity and discrimination in price-fixing is supported by the adoption of novel methods of accounting for part of an industry, despite the express provisions of the Emergency Price Control Act. Thus, the first legal question presented is whether the Administrator, under the statute, had authority to disregard established accounting methods and practices in determining cost of production, and whether or not the court erred in rejecting and approving the Administrator's disregard of the cut-out Test Method of accounting.

II

The cut-out Test Method of determining costs of producing beef is the long-established method and practice which the Administrator had no authority to disregard.

The Emergency Price Control Act of 1942 provided, in Section 2(h), as follows:

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

By amendment in the Stabilization Extension Act of 1944, the foregoing provision was strengthened to read as follows:

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except *where such action is affirmatively found by the Administrator to be necessary* to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." (Amendment italicized)

Also in the Stabilization Extension Act of 1944, Section 2(a) of the Emergency Price Control Act (which authorized and set the standards for price-fixing) was amended to include the following proviso referring to any price-fixing regulation or order:

> "*Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods."

The purpose and intent of the foregoing provisions should be obvious. The history of the Emergency Price Control Act showed a determined intention on the part of Congress to deny any power to the Administrator to compel changes in established business practices or cost accounting methods. The Administrator might try to compel such changes by ordering the adoption of novel practices or accounting methods. Any such order would be plainly forbidden by the foregoing language of the Act.

But the Administrator is here found seeking to accomplish all the evil of an order to compel changes, by requiring businessmen to do things which could only be done by a change of business practice and by requiring businessmen to set up statistics in such a manner as will permit the Administrator to adopt novel accounting methods and to arrive at novel accounting results.

Certainly that which the Congress forbade the Administrator to do directly, the Congress did not intend to authorize the Administrator to do indirectly. Yet, when the Administrator fixes prices by utilizing a novel accounting method of determining cost of production, he is certainly requiring a businessman to determine his costs "otherwise than in accordance with established accounting methods."

It is startling to read the Emergency Court's interpretation of the statutory requirement. The opinion of the court reads:

> "* * * RMPR 169 contains no provision *requiring* changes in cost accounting methods; the industry remains free to follow its old cost accounting practices. The Administrator has merely refused to accept the cut-out test method used in the industry as the yardstick for determining whether the maximum prices are generally fair and equitable. It surely was not the intention of Congress to require the Administrator, in discharging his duties under Sec. 2(a), to accept at face value the results indicated by whatever method of cost

> accounting the industry has chosen to pursue. For the same reason, we hold that the regulation does not operate 'to compel changes in the business practices, cost practices, or methods * * * established in any industry,' contrary to the prohibition of Sec. 2(h) of the Act as amended." (Italics by the court) (R. 459)

We submit that this interpretation of the statute offers a shocking encouragement to an executive official to evade the plain statutory mandate from which alone his authority proceeds. As an exercise in dialectics, it may be possible to assert with a straight face that the meat-packing industry is not *required* to change its cost accounting methods; that it "remains free to follow its old cost accounting practices." But the prices for its products are being fixed by entirely different accounting methods so that the freedom of the industry to follow its old cost accounting practices is like the freedom of a man who is not *required* to walk to jail, but who will be given a ride by the police!

The court further holds that:

> "* * * the McKellar Amendment [6] did not modify the basic statutory standard in Section 2(a) that maximum prices must be 'generally fair and equitable', which would naturally mean that the prices established must allow a generally fair and equitable margin."

Obviously, the purpose of an amendment to a law is either to change the law or to change or prevent a misinterpretation of the law. But the court supports its effort to make this amendment meaningless by quoting from a statement in the Senate by the Senator in charge of the bill explaining that the "Amendment is *in line* with the policy already established by the *Price Control Act*, and I believe it is *substantially* a restatement of existing law." (Italics ours).

There would have been no need for the amendment if the Price Administrator had previously interpreted the words

---

[6] The McKellar Amendment is printed in Appendix, *infra*, p. 38.

"generally fair and equitable" prices so as to provide that "a generally fair and equitable margin shall be allowed for such processing" (of agricultural commodities, *including livestock*). The amendment may have been "substantially a restatement of existing law" as the Congress *intended* the law to be interpreted. It may have been "in line with the policy already established by the Price Control *Act*." It was necessary, however, because the policy established by the Price *Administrator* was denying a fair and equitable margin for the processing of agricultural commodities. The court has completely misinterpreted the meaning of the senatorial statement quoted. The purpose of the amendment was to compel the Price Administrator to change his policy. That is what he has not done and yet the court sustains him in continuing to disregard the mandate of the law. If the established cut-out Test Method of accounting had been followed, then it would have been made crystal clear that the Administrator was not allowing a fair and equitable margin for processing cattle.

There is no doubt that the cut-out Test Method is the long-established method of determining the cost of beef. A brief explanation is found in the note as page 5, *supra*. According to an authoritative writer quoted by the court, "This is the accepted method of computing the cost of a dressed carcass; and it is the method that the packer must follow if he is to conduct his business intelligently" (R. 451).

The Administrator has contended that losses determined by the cut-out Test Method are mere "bookkeeping losses." This contention is based on an assumption contrary to fact—an assumption that there is a difference between the selling price of raw by-products, when they are sold by non-processing slaughterers, and the selling price of the same by-products when they are transferred by a processing slaughterer to a processing division. In a word, it will be conceded

that when a non-processing slaughterer sells a hide, he obtains for it only the ceiling price. Therefore, he can only credit that ceiling price against his cost of producing beef. But it is apparently assumed by the Price Administrator that, when Armour's Beef Division sells a hide to Armour's Leather Division, at the same ceiling price, then the cost charged to the Leather Division could be increased or decreased, and therefore that the credit to the Beef Division could be increased or decreased. But the Leather Division could not operate as a sound business in such a manner.

The Leather Division buys hides normally at ceiling prices and, whether they are bought from Armour's Beef Division or from outsiders, they must be charged in normally at ceiling prices. Therefore, no other credit could be given to the Beef Division except the same credit as though hides had been sold to a stranger. Since there have always been market prices and there are now ceiling prices for all the by-products of cattle slaughter, it is perfectly clear that the costs of producing carcass beef are exactly those determined by the cut-out Test Method.

On the other hand, the contention that the profits of processing by-products should be credited against the costs of beef production is simply the contention that the profits of several industries shall be credited to one industry in order to justify prices which compel that single industry to operate at a loss.

The theory approved by the court is, however, that in an integrated industry some commodities may be sold at a loss because their production is justified, not by their immediate profits, but by profits to be derived from by-products. It was the effort of the Administrator to prove that this was historically true as to beef, in the packing industry. But this effort failed because, although limited losses on beef production might be found intermittently in the case of a

few large integrated packers, it was obvious, first, that no such losses as now imposed had ever been suffered, and, second, that the major number of slaughterers had to seek their profits out of the sale of beef and the sale of raw by-products, and could not count on the profits of processing operations to offset losses in the sale of beef.

We submit, therefore, at the outset, that the Administrator's disregard of the cut-out Test Method of accounting was in violation of the specific requirements of the Act both as to following established accounting methods and as to fixing generally fair and equitable prices. But since the court likewise rejected the cut-out Test Method and allocated proportionate profits of by-product operations as credits to the cost of producing beef, we must analyze the basis for the judgment of the court.

III

Even allocating the profits of by-product operations as a credit against the cost of producing beef, the maximum prices for beef did not return cost of production.

The theory of the Administrator that, since the total profits of Armour and Company operations were above peacetime earnings, Armour and Company could not complain of prices that did not return the cost of production of beef, was rejected by the court. It obviously had no support in the law which authorized the Price Administrator, not to regulate industrial profits, but to fix the prices of separate commodities.

But the court took the position that in a multi-product industry, if the industry maintained aggregate peacetime earnings, it would be sufficient to validate the maximum price of a particular commodity if that maximum price covered the "out-of-pocket costs" of that commodity. The

court took the further position that the prices fixed for beef would be "generally fair and equitable" "and would allow a generally fair and equitable margin for * * * processing" if "cattle operations as an entirety" (which would include pharmaceuticals, soap, leather, etc.) were "treated as a single product or as a closely related group of products."

There is nothing in the statute which authorizes the Administrator to fix prices for "operations" producing several commodities, or to treat the combined products of the beef industry, the leather industry, the soap industry, etc. as a single industrial product. But, if we overlook the impropriety of an amendment of the statutes by the Emergency Court, and assume that in some way all cattle operations can be treated under the statute as a single industrial product, we still find that *after crediting all the profits from the by-products of cattle slaughter to the Beef Division,* the Beef Division still operates at a loss! (R. 120).

This situation compelled the court, in sustaining the Administrator, to incorporate in its opinion another novel creation of judge-made law. Without any warrant in the statute, the court announced the theory that, if an industry maintained peacetime earnings, and if the current maximum price of a particular product covered the "out-of-pocket costs" of producing that commodity, then such a maximum price could be held valid, even though it failed to cover *all* costs of production.

It was made plain by the court that "out-of-pocket costs" did *not* cover *all* costs of production. The court did not undertake to define precisely what it meant by "out-of-pocket costs," which is unfortunate since it may be difficult for anyone else to determine how the court thinks the phrase should be defined. But the court did say that out-of-pocket costs "included direct labor and material costs and undoubtedly *excluded* general overhead such as administrative and selling expenses" (R. 457).

There cannot be the slightest question that overhead, administrative and selling expenses are parts of a cost of production. They are "out-of-pocket costs" in the sense that they have to be paid for. It may be possible to argue that a return on investment need not be included in the definition of "out-of-pocket costs." It should be suggested, however, that it is just as necessary for a business to make a return on its investment as it is to pay for labor and materials if the business is to continue in operation. If a business occupies a leased building, it must pay rent in order to continue, and, by the same token, prices fixed by the government should be sufficient to pay interest to bondholders and a return to stockholders on their investment.

But it is arguable that, if an industry generally and the enterprises therein are making normal earnings, the maximum price of a particular commodity may be sustained if it covers only the "out-of-pocket costs" of producing that commodity. However, it is difficult to understand how administrative and selling expense is any less a "cost" that must be repaid in the selling price than labor and material cost. Labor and material are useless without administrative direction. Products do not move themselves either physically, which requires the payment of packing and transportation expense, or commercially, which requires the payment of selling expenses. All the administrative and selling expenses blithely ignored by the court are actual out-of-pocket payments which are attributable, and allocated, to beef production, and allowed by the Bureau of Internal Revenue as deductible expenses in arriving at net income. Sixty percent represents salaries paid to employees who are just as essential to beef production as the workers to whom wages are paid for slaughtering and dressing beef. The other forty percent represents such expenses as packing, delivering, transportation, heat, light, power, taxes, and rent, without which payments the business of beef production could not continue. (Exhibit XI, R. 125)

Yet the court could find no ground for sustaining the maximum prices fixed for beef and dismissing the complaint except by proceeding, step by step, as follows: First, reject (for Armour) the established accounting method of determining the cost of producing beef; second, credit to beef production proportionately all the profits of by-product operations related to cattle slaughter; third, treat cattle operations as an entirety with a single product; fourth, allow only "out-of-pocket costs" in cost of production; fifth, define "out-of-pocket costs" so as to eliminate from the allowance several million dollars of actual out-of-pocket payments.

We submit that, step by step, the Administrator, with the supporting arm of the court, has moved away from statutory requirements, has undertaken to exercise an authority not granted, but specifically denied, has fixed prices for a commodity which, under no possible definition, can be defined as "generally fair and equitable," or as allowing "a generally fair and equitable margin * * * for processing." Complaint against these same prices by non-processing slaughterers, based on the cut-out Test Method of figuring cost of production, has been recognized by the government as just, in the grant of an additional 80-cent subsidy to such slaughterers, and even then further sustained by the same court which rejected the petitioner's complaint.

There is only one valid distinction to be drawn between the two inconsistent rulings; there is only one real basis for the denial of petitioner's complaint, and that is the wholly illegal basis that petitioner is making more money out of all its varied industrial operations, including a mass of operations in no way related to cattle slaughter, than it made in peacetime. But we submit that taxation and the recapture of profits is the function of the Congress and the Treasury; and this duty has not been delegated, nor could it be constitutionally delegated, to the Price Administrator.

Furthermore, we submit that it is utterly unjust to the

industry as a whole to utilize the profits made by one enterprise largely out of other industrial operations, as the means of denying to the industry as a whole a fair maximum price for *its* products.

This petition presents, not a plea for sympathy or for aid to the downtrodden and the oppressed, but a simple plea for the establishment and maintenance of a rule of law and equal justice. We submit that there is no legal justification for the enforcement by the Administrator of maximum prices for beef which concededly fall far short of covering actual cost of production. We submit that the Emergency Court has found no reasons for sustaining such prices and for dismissing the complaint which can be accepted as legal reasons.

We submit that the extension of the legal theory required to support the Price Administrator in the present case would permit him to exercise an arbitrary and dictatorial control over, not only this industry, but over every multi-product industry in the United States, which was not intended, but, in fact, is expressly forbidden in the law creating his authority.

We submit that maintaining the integrity of the law as enacted by the Congress, and preserving the constitutional rights of petitioner and others subjected to the control of administrative orders not authorized by or in accordance with the law, is a matter of grave public importance, and worthy of serious and exhaustive consideration by this honorable Court.

Dated: April 28, 1945.

Respectfully submitted,

DONALD R. RICHBERG,
CHARLES J. FAULKNER,
FREDERICK R. BAIRD,
GEORGE E. LEONARD, JR.,
Attorneys for Petitioner.

APPENDIX

Emergency Price Control Act of 1942 as Amended (50 App. U. S. C. 902, 823, 924)

"SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.* Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term 'regulation or order' means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of

this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection. (Amendment of 1944 italicized.)

* * * * * * *

"SEC. 2. (h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes

in established rental practices, except *where such action is affirmatively found by the Administrator to be necessary* to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.
order, price schedule, or requirement under this Act. (Amendment of 1944 italicized.)

* * * * * * *

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, in-

cluding facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

Review

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or

proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the deter-

mination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Stabilization Act of 1942. (Amending Emergency Price Control Act of 1942). (50 App. U. S. C. 963)

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of

this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regu-

lations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processings: Provided further,* That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

(The so-called McKellar amendment is italicized.)

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulation involved	3
Statement	3
Argument	5
Conclusion	28
Appendix	29

TABLE OF AUTHORITIES

Cases:	
Borden's Farm Products Co. v. *Ten Eyck*, 297 U. S. 251	28
Costanzo v. *Tillinghast*, 287 U. S. 341	9
Currin v. *Wallace*, 306 U. S. 1	28
Dobson v. *Commissioner*, 320 U. S. 489	21
Gillespie-Rogers-Pyatt Co., et al. v. *Bowles*, 144 F. (2d) 361	10
Heinz et al. v. *Bowles*, No. 102, ECA, March 29, 1945	18, 27
Helvering v. *Northern Pacific Railway Co.*, 105 F. (2d) 730	11
Mississippi Railroad Commission v. *Mobile & O. R. Co.*, 244 U. S. 388	11
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294	9
Safeway Stores Inc. v. *Bowles*, 145 F. (2d) 836 cert. den. February 26, 1945	10
The Glendola (*Standard Oil Co. of N. J.* v. *Glendola S. S. Corp.*, 4 (F. 2d) 206	11
Statutes and Constitution:	
Constitution, Article I, Sec. 2, Sec. 7	27
Sixteenth Amendment	27
Fifth Amendment	28
Emergency Price Control Act of 1942, 56 Stat. 23:	
Sec. 1 (b)	6
Sec. 2 (a)	2, 5, 13, 23, 29
Sec. 2 (c)	31
Sec. 2 (h)	2, 22, 32
Sec. 3	32
Sec. 5 (c)	38
Sec. 204	33
Stabilization Act of 1942, 56 Stat. 765:	
Sec. 1	35
Sec. 2	36
Sec. 3	2, 12, 36
Sec. 7 (a)	6
Stabilization Extension Act of 1944, C. 325, 58 Stat. 643	9, 22

	Page
Regulations:	
Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts	3
General Maximum Price Regulation	3
Maximum Price Regulation No. 169	3
Miscellaneous:	
Executive Order No. 9250	3, 38
H. R. 4376, 78th Cong., 2d sess	6
Hearings, House Commitee on Banking and Currency on H. R. 4376, 78th Cong., 2d Sess	7
Hearings, Senate Committee on Banking and Currency on S. 1764, 78th Cong., 2d Sess	7, 9, 14
Hearings, Senate Committee on Banking and Currency on S. J. Res. 30, 79th Cong., 1st sess	11
S. 1764, 78th Cong., 2d sess	6
Senate Report No. 931, 77th Cong., 2d Sess	6
Senate Report No. 922, 78th Cong., 2d Sess	7, 9, 10, 14
Congressional Record:	
Vol. 90, p. 6366	23
Vol. 90, pp. 5603–5605	10
Vol. 88, p. 7243	13
Directive of the Office of Economic Stabilization, October 25, 1943, 8 F. R. 14641	26

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1220

ARMOUR AND COMPANY, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals appears at pages 441 to 459 of the Record. It has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 29, 1945 (R. 460). The petition for a writ of certiorari was filed April 28, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, c. 26, 56 Stat. 23 (herein sometimes referred to as "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

(1) Whether petitioner established that the maximum prices for beef carcasses and wholesale cuts under Revised Maximum Price Regulation 169 are not "generally fair and equitable" within the meaning of Section 2 (a) of the Emergency Price Control Act or do not provide a "generally fair and equitable margin" for processing within the meaning of Section 3 of the Stabilization Act of 1942.

(2) Whether the statutory standards are satisfied, as applied to a multiple-product industry, if the industry's over-all earnings are in excess of those of a normal peacetime period, and if the industry obtains, with respect to the particular product or closely related group of products, the out-of-pocket costs involved in the production of the product or group of products, exclusive of selling and general administration expenses.

(3) Whether it was arbitrary and unreasonable or contrary to the provisions of Section 2 (a) and 2 (h) of the Act relating to accounting methods for the Price Administrator to refuse to accept the cut-out test method of determining beef costs as a measure of the adequacy of maximum prices for beef carcasses and wholesale cuts.

(4) Whether petitioner and other slaughterers of cattle who process beef and its by-products are unlawfully discriminated against by the fact that a special subsidy is paid to slaughterers of cattle who do not process beef and its by-products.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, of the Stabilization Act of October 2, 1942, as amended, (56 Stat. 765) and of Executive Order No. 9250, are set forth in the Appendix, *infra*. Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts, was issued December 10, 1942, effective December 16, 1942 (7 F. R. 10381). The present proceeding involves the general level of maximum prices established by the Regulation for beef carcasses and wholesale cuts.

STATEMENT

Maximum legal prices for the sale of beef were first established by the General Maximum Price Regulation (7 F. R. 3153), issued April 28, 1942. Maximum Price Regulation No. 169, effective July 13, 1942 (7 F. R. 4653) removed beef and veal from the scope of the General Maximum Price Regulation and established maximum prices for them on the basis of each seller's selling prices during the last two weeks of March, 1942. The regulation was entirely revised and reissued on December 10, 1942, replacing individual ceilings on the basis of each seller's March, 1942 selling prices by dollars-and-cents prices uniform by zones throughout the United States.

Petitioner is engaged in the slaughter of all classes of livestock including cattle, the sale of fresh beef and other meats, and the processing and distribution

of numerous processed commodities using raw materials derived from livestock (R. 2, 122–123).

On February 8, 1943 petitioner filed its protest against the Regulation (R. 1), alleging that the Regulation required petitioner to sell beef and veal at a loss contrary to the provisions of the Act. On May 10, 1943 and August 19, 1943, petitioner filed additional evidence in support of the protest (R. 69, 79, 82, 93) pursuant to orders issued by the Administrator on March 12, 1943 (R. 65) and July 3, 1943 (R. 75). The Price Administrator, on August 24, 1943, introduced extensive evidence into the record of the protest proceeding (R. 229–230, 232–258). On October 27, 1943, the Price Administrator denied Petitioner's protest by an order and accompanying opinion (R. 281). Petitioner filed its complaint against the denial in the Emergency Court of Appeals on November 26, 1943 (R. 165). On December 30, 1943, petitioner applied to the court for leave to introduce additional evidence (R. 206). The application was granted (R. 212) and on March 31, 1944, petitioner filed its additional evidence with the Price Administrator (R. 113–125). On June 21, 1944, the Administrator issued an order and opinion denying petitioner's protest upon reconsideration (R. 127–163). An amended complaint was filed in the Emergency Court of Appeals on March 1, 1944 (R. 179), pursuant to leave granted by order of the court (R. 213).

The Price Administrator's answer, and the transcript of proceedings before him, were filed on July 21, 1944. The Emergency Court of Appeals sus-

tained the denial of the protest and dismissed the complaint (R. 441–460).

ARGUMENT

1. Petitioner's primary attack on the decision of the Emergency Court of Appeals is that the Emergency Price Control Act does not authorize the establishment or maintenance of maximum prices which return less than total costs for every product or group of products produced by a multiple-product industry, the over-all earnings of which are in excess of those of representative peacetime years. The impression created by petitioner's brief is that a construction of the Act authorizing such maximum prices was manufactured out of whole cloth by the Administrator or the court below for the purposes of this case. The fact is, however, that this challenged construction of the Act has been settled beyond question by the course of legislative history, had been consistently applied by the Administrator, and had been accepted by the court below in previous cases.

Authority to establish maximum prices is conferred upon the Price Administrator by Section 2 (a) of the Act. The same clause prescribes the standard which governs his exercise of the authority granted: the maximum prices established must be such "as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." Congressional understanding of the meaning of this basic standard is to be found in the Report of the Senate Committee accompanying the bill which became the Emergency Price Control Act of 1942. Comment-

ing on section 2 (a) of the bill, which became Section 2 (a) of the Act, the report stated:

> Because of the legislative nature of regulations establishing maximum prices, applying to large numbers of sellers, the bill does not guarantee a profit to each individual seller. It requires instead that such prices be generally fair and equitable as applied to the sellers responsible for the major part of the output of the commodity. As to such sellers it is the effect of the maximum price upon their over-all operations as business units that must be considered. (Sen. Rep. 931, 77th Cong., 2d Sess., p. 15.)

This statement, having been before every Senator during the course of the debates upon, and during the passage of, the Act, must be accorded dominant weight in determining the intention of Congress. It indicates clearly the salient importance of earnings from over-all operations in the basic statutory standard.

If any doubt remained as to the meaning of this standard, it was removed unqualifiedly by subsequent legislative history. By its terms as enacted, the Emergency Price Control Act was to terminate on June 30, 1943 (56 Stat. 24, Sec. 1 (b)). Section 7 (a) of the Stabilization Act of October 2, 1942 (56 Stat. 767) amended section 1 (b) of the Emergency Price Control Act by extending the termination date to June 30, 1944. In the spring of 1944, bills were introduced in the House (H. R. 4376, 78th Cong., 2d Sess.) and in the Senate (S. 1764, 78th Cong., 2d Sess.) to pro-

vide for the renewal of the Act for another year. During the course of protracted hearings before the Banking and Currency Committees of both Houses of Congress, the administration of the Act by the Price Administrator was exhaustively reviewed. In the course of that review, the Administrator and members of his staff explained fully the standards which had been and were being applied to determine when price increases should be granted.[1] These were concisely summarized in a supplement to the Report of the Senate Committee in the following terms:

> Of the increases authorized by the Price Administrator on the ground that they are required by mandatory provisions of the Emergency Price Control Act or the Stabilization Act, by far the most important, numerically, are those increases which are necessary if the ceilings in question are to continue to be generally fair and equitable. The so-called industry earnings standard is used for determining whether or not increases should be

[1] Oral statements by Mr. Brownlee, Deputy Administrator for Price: House Hearings on H. R. 4376, 78th Cong., 2d Sess. (1944) (hereafter referred to as House Hearings), Vol. 1, pp. 55, 62; Senate Hearings on S. 1764, 78th Cong., 2d Sess. (1944) (hereafter referred to as Senate Hearings), pp. 77–78, 91–96; written statements by the Administrator: Senate Hearings, pp. 1444–1445, House Hearings, Vol. 2, pp. 2128–2130; Memorandum on Certain Questions of Construction of the Emergency Price Control Act of 1942 relating to Standards for Maximum Prices, Senate Hearings, pp. 1404–1412, House Hearings, Vol. 2, pp. 1984–1993; Memorandum on Certain Questions of Construction of the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942, House Hearings, Vol. 2, pp. 1993, 1996–1999; Senate Hearings, pp. 1422, 1425–1428.

648219—45——2

permitted for this purpose. Under this standard, as a general rule, price increases are allowed to compensate for those cost increases which the industry cannot absorb without impairment of its normal peacetime earnings. As a guide for determining the extent to which price increases are required under this standard, the Administrator uses a representative peacetime period, usually the years 1936–39, the base period adopted by Congress for excess-profits taxes. Where this period is not fairly representative, the years included in the period are varied or other appropriate adjustments are made. If, during or subsequent to the year ended October 1, 1941, costs have increased more than gross income, then, to the extent that the industry's earnings, adjusted for changes in investment, provide a smaller return before Federal income and excess-profits taxes than the industry earned in the base period, the Administrator considers an increase in the industry's maximum prices to be required by law.

Even though a price increase is not required under the industry earnings standard, an increase may be required under the so-called products standard which is used as a secondary pricing guide in the case of multiple-product industries. Under this standard, unless it had been the industry's practice to sell some of its products below cost, the Administrator considers himself required to increase the maximum price for any particular product sold by the industry, if its current maximum price should fail to cover the out-of-pocket costs incurred by the highest-cost firms which

> are not included in the industry's high-cost marginal fringe. Ordinarily an industry will be considered as a single-product industry even though the bulk of the product is produced by multiple-product firms if a substantial portion of the output is produced by single-product firms. (Sen. Rep. No. 922, 78th Cong., 2d Sess., pp. 45–47.)

To put it briefly, the Administrator repeatedly told Congress in the clearest terms that if an industry which produced many products was earning, in its over-all operations, more than it had earned in representative peacetime years, he did not believe that the Act required him to increase the prices for individual products of that industry so long as the prices covered the out-of-pocket costs incurred by the industry in the production of those products. The Administrator and his subordinates also told Congress why any other standard would be both contrary to the normal practices of industry and destructive of stabilization.[2] Congress then extended the effective date of the Act, without making any change in the basic standards.[3] The conclusion is inescapable that the Administrator's interpretation of what constitutes "generally fair and equitable prices" under the Act has met with Congressional acceptance and approval. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 313; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345. The Emergency Court

[2] Senate Hearings, *supra*, pp. 95–96.

[3] Stabilization Extension Act of June 30, 1944, c. 325, 58 Stat. 643.

of Appeals had so held in *Gillespie-Rogers-Pyatt Co., et al.* v. *Bowles*, 144 F. (2d) 361 (1944). That holding was clearly right. Cf. *Safeway Stores Inc.* v. *Bowles*, 145 F. (2d) 836, cert. den. February 26, 1945, Nos. 798–799, this Term.

Contrary to petitioner's unsupported assumption, it is clear that the product standard formulated in terms of "out-of-pocket" costs did not refer to total costs.[4] In the *Gillespie* case, the Emergency Court of Appeals stated (144 F. (2d) at 366):

> We think that Congress fully understood and approved the use by the Administrator of the industry earnings and product pricing standards when it extended the Emergency Price Control Act by the enactment of the Stabilization Extension Act of 1944.

The industry involved in that case was a multiple product industry. The complaint was dismissed because the complainants had failed to show that the industry's over-all earnings were below those of a representative peacetime period, and because the figures actually submitted

> do not show, even for the most recent period, an out-of-pocket manufacturing loss which under the application of the product standard would call for a price increase regardless of the over-all earnings of the industry. (144 F. (2d) at 368.).

This is, of course, consistent with the general use of

[4] See, for example, the views of the minority of the Senate Committee on Banking and Currency, S. Rep. No. 922, 78th Cong. 2d Sess., p. 25; remarks of Senator Taft during debate, 90 Cong. Rec. pp. 5603–5605, June 9, 1944.

the phrase apart from its use in connection with the Act.[5]

In the light of these facts, petitioner's entire argument assumes a vitally different aspect. Since it is manifest that the basic standard of the Act does not require more than the return of out-of-pocket costs on products of a multiple-product industry whose over-all earnings are at least equal to those of peacetime years, the only remaining questions presented by the petition are the application of the standard to the meat industry in the light of other provisions of the Act, and the alleged unconstitutional discrimination attendant upon the payment of a special subsidy to a special class within the industry, the non-processing slaughterers.

[5] See *Mississippi Railroad Commission* v. *Mobile & O. R. Co.*, 244 U. S. 388, 395; *Helvering* v. *Northern Pacific Railway Co.*, 105 F. (2d) 730, 731 (C. C. A. 8, 1939); *The Glendola* (*Standard Oil Co. of N. J.* v. *Glendola S. S. Corp.*), 47 F. (2d) 206, 209 (C. C. A. 2, 1931). The Price Administrator did not formulate a precise definition of the phrase "out-of-pocket costs" during the hearings on the Stabilization Extension Act. Recently, at the hearings before the Senate Banking and Currency Committee on S. J. Res. 30, 79th Cong. 1st Sess., a joint resolution extending the effective period of the Act, Mr. James F. Brownlee, the Deputy Administrator for Price, stated (p. 109):

"Again, we do not believe that, as a working administrative rule, we should try in each case to make an exact determination of what costs are "out-of-pocket costs." Out-of-pocket costs are those which would be eliminated if manufacture of the product were to be discontinued. While these are the costs which in principle should be covered, we have found that it is often a matter of serious accounting difficulty to compute them—as, for example, to find out just what part of factory overhead is included in out-of-

2. The first of these questions is whether a different standard is applicable to products processed from agricultural commodities because of the so-called McKellar Amendment to section 3 of the Stabilization Act of 1942. Section 3 of that Act sets minimum limits on the maximum prices which may be established for agricultural commodities and commodities processed therefrom. It modified the provisions of section 3 of the Emergency Price Control Act. The McKellar Amendment is a proviso to section 3 and reads as follows (*infra*, p. 38):

> *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing:

In the first place, as the Court below observed, "generally fair and equitable prices", the words of section 2 (a), "would naturally mean that the prices established must allow a generally fair and equitable

---

pocket costs. We have come to the conclusion, therefore, that as a working rule we ought ordinarily to use the higher measure of manufacturing costs, although deductions from these costs, or additions to them, will be appropriate in some cases. By then using an average of these manufacturing costs, with or without such adjustment, we are able to cover the out-of-pocket costs for the bulk of the output."

In the present case, it is undisputed that the maximum prices have covered total manufacturing costs on cattle operations as a whole. It therefore was unnecessary for the Administrator or the court below to determine whether anything more than general administration and selling expenses could properly be deducted from total costs in determining out-of-pocket costs.

margin" (R. 458). In other words, the natural meaning of the language of section 2 (a) and of the McKellar Amendment is the same. Moreover, the grammatical form of the McKellar Amendment is incompatible with petitioner's position. The proviso does not require that there should be an equitable margin for each product resulting from the processing of livestock and other agricultural commodities. On the contrary, it requires only that there be a "generally fair and equitable margin" for "such processing," that is, the processing of agricultural commodities including livestock. These considerations, involving the language of the statute alone, should settle the question.

If any doubt existed, it would be resolved by the legislative history of the adoption of the McKellar Amendment. When the amendment was offered on the floor of the Senate, Senator Brown, who was in charge of the bill said (88 Cong. Rec. 7243):

> Mr. President, that Amendment is in line with the policy already established by the Price Control Act, and I believe it is substantially a restatement of existing law. As I understand, the Senator from Tennessee desires that the policy be restated in the joint resolution. Personally I have no objection.

In the face of this powerful evidence as to the identity between the standards of section 2 (a) of the Act and the McKellar Amendment, petitioner can only urge the unsupported hypothesis that Congress, in passing the McKellar Amendment, must

have been trying to correct the Price Administrator's previous errors.[6]

The error in this hypothesis is demonstrated by subsequent legislative history. In reporting the bill which became the Stabilization Extension Act of 1944, extending the Emergency Price Control Act, the Senate Committee on Banking and Currency included the so-called Bankhead Amendment, which specifically provided that maximum prices for textile products processed wholly or in substantial part from cotton should include, for each textile item, a reasonable profit. That this was recognized to be a departure from the pricing standards in the Act appears from the views of the minority of the Senate Committee which had opposed the Amendment.[7]

[6] If speculation must be resorted to, a reason for the McKellar Amendment may be found which is in accordance, instead of being in direct conflict, with every other indication of the legislative intention. Congress may well have feared that the new and extensive provisions in the Stabilization Act relating to agricultural commodities, and commodities processed from them, would be construed as entirely superseding the standards of the original act insofar as such commodities were concerned.

Even at the time of the hearings on the Stabilization Extension Act, Senators Taft and Danaher expressed some doubt as to the effect of the Stabilization Act upon the standards in Section 2 (a) of the Emergency Price Control Act. Senate Committee on Banking and Currency, Hearings on S. 1764, 78th Cong., 2d Sess., pp. 1159, 1163–1170. There appears at pp. 1422 *et seq.* a memorandum submitted by the Price Administrator setting forth his views on the relationship between the two Acts.

[7] Sen. Report No. 922, 78th Cong., 2d Sess., pp. 24, 25.

If the McKellar Amendment had established for commodities processed from agricultural commodities a different pricing standard from that established by section 2 (a) of the Emergency Price Control Act, the controversy over the Bankhead Amendment, which was finally adopted in modified form, would have been unnecessary.

We submit, therefore, that the court below was plainly right in holding that the McKellar Amendment did not establish standards for maximum prices for agricultural commodities or their products different from the standards established by section 2 (a) for commodities generally.

3. The next question is whether the court below made an unwarranted departure from the established standards for determining the general fairness and equity of maximum prices by applying the product standard to cattle operations as a whole, instead of applying it to beef operations as measured by the cut-out test method of determining beef costs. This question is essentially bound up with the nature of the meat packing industry. It is necessary therefore to review briefly a few of the outstanding characteristics of the industry. One outstanding fact is that livestock slaughter is heavily concentrated

645219—45—3

in the small minority of large packing companies.[8] Just as the greater part of cattle slaughter is concentrated in the very small minority of packers, so the greater part of cattle slaughter is carried on, not as an isolated activity, but in the closest relationship with many other slaughtering and processing activities (R. 289–291). Fresh beef cuts constitute one of the most important products of the industry, but there is a vast number of processed products in which beef and other materials derived from the slaughter of cattle are used. Beef itself is not only sold fresh by packers for retail distribution, but is dried and cured, fabricated into special cuts suitable for hotels and restaurants, ground into hamburger, and ground or chopped for use in sausage. Moreover, the dressed beef carcass constitutes only about two-thirds of the usable weight of cattle (R. 289, 311–312). For the most part, the remaining materials derived from cattle do not reach the consumer in an unprocessed state, but enter as raw materials into many items manufactured by the meat packing industry such as sausage and canned meat, casings for sausage,

[8] A profit study of the industry made by the Office of Price Administration disclosed that 53 meat packing companies had combined sales in 1939 equal to 85% of the total sales value of all meat and by-products produced in that year. Nine companies, with individual sales of $50,000,000 or more, accounted for over 70% of the total (R. 317, note). Cattle slaughter reflects the high degree of concentration which characterizes the industry generally. The four largest packers alone account for about 50% of the nation's total wholesale slaughter of cattle, and for about 60% of the federally inspected slaughter (R. 367).

glue, fertilizer, and stock and poultry feed (R. 290). Petitioner's processing operations run the full gamut (R. 122–123).

It was in the light of these undisputed facts about the meat packing industry that the Administrator rejected the cut-out test as a measure of beef costs for the industry. The Administrator described the cut-out test as follows in his opinion dated June 21, 1944, which accompanied the order denying petitioner's protest (R. 135):

> The starting point in the test is the price of the steer. This is divided by the percentage yield, the average percentage of the dressed weight of carcasses of that grade to the live weight of the cattle. This would represent the cost of the carcass on a dressed weight basis; i. e., the cost of the carcass if the entire cost of the live animal were allocated to the carcass. Thus, if the cost of a thousand-pound steer were $15.00 per cwt., and it yielded 580 pounds of dressed carcass, a yield of 58%, the cost of the dressed carcass would be $15+0.58, or $25.86 per cwt. To this quotient there is added the expense of producing the carcass. From this total cost, there is deducted a credit for byproducts; that is, those materials derived from the steer which are not a part of the dressed carcass. The amount of the credit is customarily determined by reference to the market value, or, since price control, the ceiling prices of the various byproducts in unprocessed form, without regard to the fact of whether or not the slaughterer sells them or himself processes

> them or uses them as raw materials for other products. The difference between the result of this calculation and the ceiling price for the carcass is the cut-out loss or gain.

The Price Administrator's criticism of the cut-out test [9] was stated as follows in his opinion of June 21, 1944 (R. 135–136):

> The Administrator concluded in the opinion of October 27, 1943, that a loss so calculated was merely a bookkeeping loss. The reasons for this conclusion are evident. In actual operations, a packer buys a lot of steers, breaks them up, processes the parts in a variety of ways, and finally sells them. His "costs" are the sum of the price paid for the steers and the money expended for labor, materials, and overhead in processing and selling the products. Comparing that sum with the total proceeds derived from the sale of all the products obtained from the steers shows

[9] Petitioner charges the Administrator with inconsistency in using the cut-out test as a guide in recommending measures of relief for the non-processing slaughterers. It is self-evident, however, that the test is far more significant as applied to the operations of a cattle slaughterer whose total realization is derived from the sale of beef and cattle by-products in unprocessed form than as applied to the operations of a typical packer. The Emergency Court of Appeals in *Heinz et al.* v. *Bowles*, decided March 29, 1945, set aside the Regulation as applied to non-processing slaughterers on the ground that inadequate provision had been made for this special group in the industry. The judgment setting the Regulation aside was vacated, with the agreement of counsel for the complainants, for the purpose of securing further evidence as to the actual operating experience of the non-processing slaughterers under the Regulation and the special subsidy which they receive.

whether the packer made a profit or suffered a loss. The cut-out test does not give a comparable result. In the first place, the entire cost of the live animal is thrown onto the dressed carcass. No part of that cost is allocated to the material which represents the remaining third of the animal. While a so-called "credit" is given for byproducts, that does not even purport to represent the *cost* of those byproducts. Under these circumstances, the results cannot be said to represent the actual cost of the carcasses. Moreover, the amount of the credit is determined by reference to the market value or ceiling price of the unprocessed byproducts, whereas it is the most important characteristic of the packing industry that it does not in general sell those byproducts, but processes them extensively before sale. Hence neither the market prices for byproducts in unprocessed form, nor ceiling prices based on those market values, can be said to reflect either the cost of the unprocessed byproducts or their value to packers. Moreover, since packers generally further process the byproducts, any value assigned to them for purposes of transfer to the processing departments is essentially a matter of internal bookkeeping and nothing more.

The Administrator found that his doubts as to the adequacy of the cut-out test to measure truly the results of beef operations were reenforced from other sources. In addition to the admissions of authorities on meat packing accounting that the method was inherently "somewhat arbitrary" and showed only

"apparent cost" (R. 136, 137), he pointed to the Federal Trade Commission Report on the Meat Packing Industry, made some years before (R. 137–138), which concluded that "The departmental account accordingly shows a bookkeeping rather than an actual final result." (R. 452).

But the Administrator found even more striking confirmation of his doubts about the reliability of the cut-out test as a measure of fresh beef operations. Applying it to cattle and beef prices which prevailed at Chicago in the years before price control, he discovered that there had been an almost unbroken history of loss since 1937 (R. 245–251). Petitioner did not challenge the Administrator's finding, based on this evidence, that the industry generally sustained a "loss" on fresh beef operations, when measured by the cut-out test, before price control. Indeed, this conclusion was confirmed by the fact that petitioner's own beef department, which included some returns not included in the simple cut-out test,[10] showed increasing losses in the years 1938 through 1941, years of increasing over-all profits and of increasing profits from all processing operations. This history, prior to price control, of almost continuous and increasing losses on beef operations, measured by the cut-out test, during a period of increasing profitability for the meat packing industry, suggested that

[10] Even petitioner does not use the cut-out test in its simplest form to measure the results of its own beef department operations. For example, the cut-out test assumes that all beef is sold in the form of carcasses at the carcass ceiling price. The beef department, however, reflects, at least in part, whatever additional profit may be derived from curing and drying beef (R. 124–125, note). It apparently also reflects any profit derived from fabricating beef cuts for sale to purveyors of meals, and grinding into hamburger (*id.*). Basically, however, the beef department

this test could not properly be accepted as a reliable measure of costs for the purposes of price control.[11]

The issue here, however phrased by petitioner, is essentially one of factual determination, a task peculiarly within the competence of the Administrator, subject to judicial review by the Emergency Court of Appeals as to the reasonableness of his determination. Cf. *Dobson* v. *Commissioner*, 320 U. S. 489. When the foregoing facts are considered, it is evident that petitioner's argument falls far short of showing that the court below was wrong in its conclusion on this phase of the case (R. 454):

> On the whole, we cannot say that the Administrator was without rational support in his conclusion that the cut-out test method of cost accounting is not an acceptable yardstick for determining whether the Regulation establishes generally fair and equitable maximum prices.

If the Administrator was warranted in rejecting the cut-out test as a measure of beef costs—and we

---

results, like the cut-out test, are based upon the assumption that all products derived from the slaughter of cattle are sold in unprocessed form at the market or ceiling price, even though they are used for further processing.

[11] The sharp increase in beef department losses since price control, to which petitioner refers, has been accompanied by even sharper increases in processing profits and in over-all profits (R. 147). This phenomenon of increasing losses accompanied by increasing profits from related operations is not self-contradictory, as it may at first appear. The increasing profitability of processing operations increases the value of cattle and thus tends, in a period of great demand, to increase their cost to the packer. By the cut-out test, that cost is thrown entirely on fresh beef operations, thus increasing the "loss" shown by that method of accounting.

submit that he clearly was—it follows that the secondary product standard could not practicably be applied to beef operations alone. There remained the possibility of treating together the closely related group of products which use material derived from the slaughter of cattle. This possibility was adopted by the court below, rejecting the Administrator's contention that only over-all earnings should be considered.

It is still necessary to consider petitioner's argument that certain provisions of the statute remove the question of the acceptability of the cut-out test from the realm of administrative judgment and require the Price Administrator to accept it as the method of determining beef costs, no matter how inappropriate or unreasonable it may be for the purposes of price control.

4. Petitioner contends that Section 2(h) of the Act, and a new provision added to Section 2 (a) by the Stabilization Extension Act of 1944, left the Administrator no choice but to accept the cut-out test as the final measure of beef costs in establishing and maintaining maximum prices. Section 2 (h) provides:

> The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

The new proviso to Section 2 (a) reads as follows:

> *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.

Here again petitioner's argument has to be made in conflict with the language of the statute. This proceeding did not involve any provision of a regulation "requiring" the determination of costs in any particular way. The question was simply what factors the Administrator was required to consider, and how much weight he was required to give them, in determining whether it was incumbent upon him to adjust maximum prices. Once again, any doubt that might conceivably be wrung from the language of the Act is set at rest by the legislative history. Senator Wagner, as chairman of the Senate conferees, made the following statement in presenting the conference bill to the Senate:

> This amendment was agreed to because, while imposing a salutary limitation on the Administrator's discretion by denying him the authority to prescribe the use of accounting methods conflicting with those methods generally established in the accounting profession, the provision does not restrict the Administrator's discretion in establishing maximum prices or in prescribing the factors to be used in calculating maximum prices. (90 Cong. Rec. 6366.)

Section 2 (h) is equally irrelevant, and for substantially the same reasons. The regulation here under

attack does not "compel changes in the cost practices or methods" of the meat packing industry.

As a matter of fact, the determination of the results of cattle operations as a whole, under the standard adopted by the court below, does not even indirectly tend to accomplish a change in petitioner's regular accounting methods. As shown by the additional evidence submitted by petitioner, all that is necessary is a further calculation from data which underlie petitioner's regular accounts. Petitioner, like integrated packers generally, keeps profit and loss records on a departmental basis. To maintain those records for the processing departments, it is necessary to assign a value to the raw materials transferred from the slaughtering departments. Those values provide a basis for allocating the profits of the processing departments back to the several slaughtering departments. Petitioner explained this method, when it submitted additional evidence to the Administrator, in the following terms (R. 116):

> In an integrated packing plant doing extensive processing of byproducts, the results obtained on the byproducts from the slaughter of cattle are not inextricably mingled with the results obtained on the byproducts from the slaughter of other animals. The very fact that byproducts are charged to byproduct processing departments on the basis of current market values makes it possible to make an equitable allocation of the results of a byproduct department which does joint processing of materials from more than one class of animal and of nonanimal materials. Such

an equitable allocation is applied and explained in Exhibit I.

It seems beyond dispute, therefore, that no actual change in petitioner's accounting methods is "required" or "compelled" by the decision below.

5. There remains for consideration petitioner's claim that it, and the greater part of the packing industry, were unlawfully discriminated against because they did not share a special 80-cent subsidy given to non-processing slaughterers. The Administrator had found that there was a special group of slaughterers, accounting for about 15% of the nation's wholesale cattle slaughter (R. 359), who were differentiated from the rest of the industry in that they performed no processing operations whatsoever. Their entire business was confined to the slaughter of cattle and the sale of fresh beef and cattle by-products in unprocessed form. This group, therefore, obtained none of the returns from the processing of beef and by-products enjoyed by the industry generally. Although there was some indication that these non-processors had, under normal conditions, obtained prices higher than the general market, the Administrator concluded that he could not authorize a higher selling price for them; to do so would have destroyed the structure of dollars-and-cents prices for meat which he had found to be essential for effective price control (R. 304). He therefore recommended to the Director of the Office of Economic Stabilization that a special subsidy be provided for non-processors which would make it possible for them

to continue in business. The recommendation was adopted by the Director and included in a plan for the general stabilization of cattle prices announced in a directive issued on October 25, 1943 (8 F. R. 14641).

It is this action which gives rise to the claim of unlawful discrimination. The claim must be judged in the light of the unchallenged evidence in the record that the over-all earnings of the meat packing industry under price control were far in excess of peacetime earnings. Petitioner's argument might suggest that its own extraordinary prosperity was due entirely to operations wholly unconnected with cattle slaughter, or, indeed, with any meat operations. But even excluding from petitioner's over-all earnings the results of all departments not using raw materials derived from cattle slaughter, the remaining earnings were far above peacetime earnings from comparable operations (R. 146). Moreover, the record is perfectly clear that this prosperity was not only shared fully by the other large packers, who, as already noted, together account for the greater part of cattle slaughter, but also by the medium sized and small packers (R. 326, 157, 158). Petitioner's own results also indicated clearly that the product standard was satisfied; that is, that out-of-pocket costs were returned on cattle operations. As the court below noted, these operations in 1943 fell short by only $269,000 of covering the total costs of the related operations, and provided a margin of $8,259,000 above total production or manufacturing costs (R. 458).

For the industry as a whole, therefore, and particularly for petitioner and the other large packers, the Regulation was "generally fair and equitable" as measured by standards developed by the Price Administrator and approved by the Congress. The Administrator believed, however, that he should attempt to secure some relief for the special group of non-processing slaughterers.[12] Section 2 (c) of the Act authorizes the Administrator to establish "such classifications and differentiations * * * as in the judgment of the Administrator, are necessary or proper in order to effectuate the purposes of this Act." Assuming that the Regulation was generally fair and equitable for the industry as a whole, there can be no reasonable doubt that this section authorized the Administrator to make appropriate provision for a class in the industry which would otherwise have been faced with the real possibility of destruction of their business.

Petitioner urges, as one of the reasons for granting the writ (Pet., p. 11), that this action violates the Constitution in several respects. The constitutional limitations regarding taxation (Article I, Sections 2 and 7, and the Sixteenth Amendment) to which petitioner refers are, we submit, clearly irrelevant. It is also urged that there has been arbitrary discrimination and a denial of equal protection of the

[12] The Emergency Court of Appeals, in a related case involving the same Regulation, held that the Administrator was legally obligated to protect this special group of sellers. *Heinz et al.* v. *Bowles*, *supra*, note 9, p. 18.

laws in contravention of the Fifth Amendment. We submit that the foregoing facts plainly show the existence of a reasonable basis for the classification which has been established. Nothing more is required by the Fifth Amendment. Cf. *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251; *Currin* v. *Wallace*, 306 U. S. 1.

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

RICHARD H. FIELD,
General Counsel,
NATHANIEL L. NATHANSON,
Associate General Counsel,
JACOB D. HYMAN,
Assistant General Counsel,
Office of Price Administration.
MAY 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, as amended, the Stabilization Act of 1942, as amended and Executive Order No. 9250:

Emergency Price Control Act of 1942, 56 Stat. 23, as amended June 30, 1944:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases

in profits earned by sellers of the commodity or commodities, during and subsequent to the year, ended October 1, 1941: *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make

such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

* * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodation is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum

rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

* * * * *

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

* * * * *

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton,

rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).[7]

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time

notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until

other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Stabilization Act of 1942, 56 Stat. 765, as amended June 30, 1944:

SECTION 1. In order to aid in the effective prosecution of the war, the President is au-

thorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined

and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commoditity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President shall, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufac-

tured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weightings hall be given to farm labor. SEC. 5.

* * * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

Executive Order No. 9250, Title IV, Sec. 4, 7 F. R. 7871.

The provisions of sections 3 (a) and 3 (c) of the Emergency Price Control Act of 1942 are hereby suspended to the extent that such provisions are inconsistent with any or all prices established under this Order for agricultural commodities, or commodities manufactured or processed in whole or in substantial part from an agricultural commodity.

U. S. GOVERNMENT PRINTING OFFICE: 1943

Office - Supreme Court, U. S.
FILED
MAY 25 1945
CHARLES ELMORE CROPLEY
CLERK

(3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1220

ARMOUR AND COMPANY, AN ILLINOIS CORPORATION,
Petitioner,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent

REPLY BRIEF FOR PETITIONER

DONALD R. RICHBERG,
CHARLES J. FAULKNER,
FREDERICK R. BAIRD,
GEORGE E. LEONARD, JR.,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1220

ARMOUR AND COMPANY, AN ILLINOIS CORPORATION,
Petitioner.

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent

REPLY BRIEF FOR PETITIONER

The peculiar characteristics of the brief for respondent compel the filing of this reply brief in behalf of petitioner.

The Single Issue Now Presented

It was obviously impossible to argue the merits of a case of this magnitude in petitioner's brief. Counsel for petitioner, in a brief which would comply with the rules, could only explain the issues involved and outline the argument to be made, with the object of demonstrating that this was a case in which a review on writ of certiorari should be granted because of the importance of the questions presented.

Among the reasons officially described (Rule 38) as appealing to the Court's discretion are (1) that a Circuit

Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this court," and (2) "where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court."

The present petition seeks a review by this Court of a construction of the Emergency Price Control Act of 1942, as amended, which affects the prices and production of every multi-product industry in the United States. There has been no ruling by the Supreme Court upon the questions presented, or upon the proper construction of the provisions of the statute involved. Exclusive judicial review of administrative construction of the Emergency Price Control Act is given to only one court, the United States Emergency Court of Appeals, whose opinions and decisions can only be reviewed through the grant of a writ of certiorari by the Supreme Court.

We might have reasonably assumed that the Solicitor General would not oppose certiorari in the present case. We can only assume that opposition to a review is based, not on a desire to have the law settled by the Supreme Court, but upon a fear that, on adequate review, the dubious constructions of the law adopted by the Price Administrator, and, with obvious difficulty, sustained by the Emergency Court, would be disapproved by the Supreme Court.

It is worthy of note that the brief in opposition does not advance a single reason to justify the denial of an adequate review of the record of this case. Instead, the brief is devoted to an effort to convince the Court that the decision below should be affirmed. Yet it would be impossible for this Court, on the basis of the limited arguments here permissible, to arrive at a well-grounded decision on the merits

without such a review of the record by the individual justices as would be inappropriate, and indeed impossible, in passing upon the petition for a writ of certiorari. We submit that the immediate question here and now presented is whether the petition should be granted in order that questions of law of vast importance shall be settled by this Court. The question is not as to whether, on the basis of very brief and necessarily incomplete arguments, the judgment below should be affirmed or reversed.

The Issues to Be Presented

As an example of inadequate presentation of important issues, we will call attention to the misconstructions of the federal statute which the brief for respondent seeks to impose upon the Court through self-serving, quotations from the Price Administrator's own statements, and misleading, fragmentary quotations from congressional sources.

Consider, for example, the discussion of the McKellar Amendment (Opposition Brief, pp. 12-15). Counsel for respondent seek to convince the Court that the McKellar Amendment, which commanded the Price Administrator to allow "a generally fair and equitable margin" for the processing of agricultural commodities "including livestock," was a meaningless enactment, and cite an equivocal explanatory statement by Senator Brown (Brief, p. 13) to the effect that "that amendment is in line with the policy already established by the Price Control Act, and I believe it is substantially a restatement of existing law." Anyone familiar with the extensive record involved would know that the McKellar Amendment sprang from bitter opposition to the failure of the Price Administrator to allow a fair and equitable margin for processing. Anyone familiar with this record would know that the denaturing of the McKellar Amendment by an administrative construction, approved by the Emergency Court, has been the subject of bitter

condemnation by members of Congress voiced repeatedly in congressional hearings. Yet, counsel for respondent are willing to have this Court misled in the limited consideration which can be given to a petition for certiorari, and are willing to ask this Court to refuse to review a misconstruction of the law, on the strength of assertions which counsel well know would be vigorously challenged in an adequate review of this case.

Indeed, while the brief for respondent was being written, the Committee on Agriculture of the United States Senate was making an interim report criticizing severely the administration of the law by the Price Administrator in regulating meat prices, which report included the following statements:

> "The committee are convinced from the testimony that at the present time substantial losses are being incurred by processors on both beef and pork operations. Many small packers have been forced to close, curtail their operations, go broke, or go 'black,' because of their inability to continue to take these losses. The Office of Price Administration officials have assured this committee from time to time that they would correct these inequities administratively. In the case of pork an announcement was made which purported to make pork operations profitable. The Office of Price Administration has since admitted that such relief was inadequate. Later they announced their 10-point program for beef which they said made beef operations profitable. Testimony produced before this committee clearly established that this program causes packers greater losses than they were sustaining under the program it superseded. This committee believe processors should have a margin of profit for processing of each species of livestock. In view of the recent court decisions, Congress must amend the Emergency Price Control Act so that it will be *unmistakably* construed in that manner. This committee, therefore, recommend that the Banking and Currency Committee of the Sen-

ate, which now has before it a bill to extend the Price Control Act, incorporate in that bill an amendment that will accomplish this result." (Italics ours.) (79th Congress, 1st Session, Senate Report No. 270.)

Also during the writing of the brief for respondent, the Special Committee to Investigate Food Shortages for the House of Representatives made a report which included findings that "legitimate slaughterers operate at a loss when buying their livestock at ceilings. The Office of Price Administration admits this." The committee report also states:

> "In conclusion the committee wishes to emphasize its belief that the greatest mistake made in the control of meat prices was to begin by pricing at the retail level and then working backward."

(The arbitrary, illegal character of this procedure is one of the very questions involved in the present case.)

The committee included in its recommendations the following:

> "3. Fair and equitable margins should be established in every operation of the production, processing, and distribution of meat with special incentives for feeders of cattle to produce better and heavier beef, due consideration being given to the over-all feed situation." (79th Congress, 1st Session, House Report No. 504.)

Our only purpose in citing the foregoing reports is to show, first, how impossible it would be for this Court, upon a meager consideration of the briefs in support and in opposition to the petition to arrive at the conclusion sought by counsel for respondent that "the decision below is correct and does not warrant further review," and, second, that the questions presented, involving the construction and administration of the Emergency Price Control Act, are of such extraordinary public importance that they are the sub-

ject of discussion in practically every home in America, and are absorbing daily the attention of the Congress of the United States. Many bitterly-debated questions as to the proper construction and administration of this far-reaching federal statute are clearly presented for determination by the Supreme Court for the first time in the record of the present case. We submit that it would be difficult to present a case in which the grant of a petition for a writ of certiorari would be more urgently called for than in the present instance.

Respectfully submitted,

DONALD R. RICHBERG,
CHARLES J. FAULKNER,
FREDERICK R. BAIRD,
GEORGE E. LEONARD, JR.,
Attorneys for Petitioner.

Dated: May 25, 1945.